Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of:	)	
	)	
CONSUMER BANKERS ASSOCIATION	)	CG Docket No. 02-278
	)	
Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code	)	

REPLY COMMENTS OF CONSUMER BANKERS ASSOCIATION IN SUPPORT OF PETITION FOR DECLARATORY RULING

The Consumer Bankers Association ("CBA") hereby replies in support of its Petition for Declaratory ruling ("Petition") filed with this Commission on November 19, 2004.

No commenter in this proceeding, including the governmental agencies of the State of Indiana (collectively "Indiana"), denies that the provisions of Indiana law described in the CBA's Petition for Declaratory Ruling are more restrictive than those of the federal telemarketing regime. Similarly, no commenter denies that Indiana's rules create inconsistent and conflicting obligations for persons engaged in interstate telemarketing.[1] Indiana, however, denies this Commission's plenary jurisdiction over

[1] The comments in this proceeding overwhelmingly support the CBA's position. Comments of Verizon in Support of Petitions for Declaratory Ruling, CG Docket No. 02-278 (Feb. 2, 2005) ("Verizon Comments"); Comments of the American Financial Services Association in Support of Petitions for Declaratory Rulings filed by the Consumer Bankers Association and National City Mortgage Co., CG Docket No. 02-278, (Feb. 2, 2005) ("AFSA Comments"); Comments of the American Teleservices Association in Support of Consumer Bankers Association's Petitions for Expedited Declaratory Ruling, CG Docket No. 02-278 (Feb. 2, 2005) ("ATA Comments"); MCI, Inc. Comments, CG Docket No. 02-278 (Feb. 2, 2005) ("MCI Comments"); Comments

interstate telemarketing and argues that Indiana's rules, even as applied to interstate calls, may not lawfully be preempted.[2] Indiana also argues that the balance struck by Congress and the Commission, between the interests of consumers and the legitimate concerns of interstate providers of goods and services, must be rejected in favor of continued state experimentation with the terms on which interstate telemarketing may be conducted.

Indiana's arguments are without merit and should be rejected, and the Commission should declare its general jurisdiction over interstate telemarketing, or should enter a declaratory ruling that preempts the provisions of Indiana law described in the CBA's Petition.

I. INDIANA'S COMMENTS, AND ITS PUBLICITY CAMPAIGN AGAINST ASSERTION OF THIS COMMISSION'S JURISDICTION, CONFIRM THE NEED FOR BROAD PREEMPTION OF STATE REGULATION OF INTERSTATE TELEMARKETING

In its Petition, the CBA pointed out that the Indiana telemarketing statute and associated rules are substantially more restrictive than, and in fact are in direct conflict with, the Telephone Consumer Protection Act ("TCPA") and the Commission's regulations. Specifically, Indiana does not permit telemarketers to place interstate calls to subscribers on the Indiana do-not-call list, even when the caller has an established business relationship ("EBR") with the consumer of the kind recognized in the Commission's rules. Indiana permits such calls only to persons that have made an

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of MBNA America Bank, N.A., CG Docket No. 02-278 (Feb. 2, 2005) ("MBNA Comments"). All filings submitted in this proceeding on February 2, 2005, unless otherwise noted, will hereinafter be short cited.

[2] State of Indiana's Comments in Opposition to the Consumer Bankers Association's Petition for Declaratory Ruling ("Indiana Comments"); Indiana Consumer Counselor Comments.

"express request" for the call, or "in connection with an existing debt or contract for which payment or performance has not been completed at the time of the call."[3]

As the CBA's Petition states, Indiana's narrow exceptions do not cover the most common kinds of EBR encompassed by the Commission's rules and prohibit whole categories of interstate calls that may be made under federal law.[4]

Pursuant to the Commission's invitation to "any party that believes a state law is inconsistent with section 227 [of the Communications Act] or our rules [to] seek a declaratory ruling," CBA filed its present Petition pointing out that Indiana's law applies to interstate as well as intrastate calls and therefore would subject the CBA's member institutions to "multiple, conflicting regulations" in violation of Congress's policy to create "uniform national rules for interstate telemarketing."[5]

Events since the Petition was filed confirm Indiana's intention to enforce its more restrictive requirements against interstate telemarketers. Notably, in a press release dated January 25, 2005, the Indiana Attorney General declared his opposition to the CBA's Petition and mischaracterized the Commission's rules as giving "member banks here in Indiana and across the nation . . . unlimited access to you and your home to make

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[3] Petition at 3, citing Burns Ind. Code Ann. § 24-4.7-2-5.

[4] Specifically, Indiana does not permit "EBR" calls based upon past inquiries or applications concerning the calling party's products or services. *Id*. at 3. Indiana also does not recognize EBRs based upon completed purchases or transactions made within 18 months prior to the call, and does not permit an EBR to extend to affiliated entities that "the consumer reasonably would expect . . . to be included within" the EBR. *Id*. at 4 (citation omitted). In all of these respects, Indiana's statute and regulations are more restrictive than the Commission's rules.

[5] *Id*. at 5; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 191*, 18 FCC Rcd 14014, 14064 (2003) ("*TCPA Order*").

repeated sales calls."[6] The press release did not mention, and the Indiana Attorney General appears never to have acknowledged, that Indiana residents can avoid further calls from companies with which they have an EBR, under this Commission's rules, simply by asking to be placed on a company-specific do-not-call list.

The Indiana Attorney General's press release included a list of CBA member banks that have local branches or do business in Indiana, and urged Indiana residents both to contact those banks and to file comments with the FCC opposing the CBA's Petition. The Indiana Attorney General reinforced this appeal with a newspaper article dated February 15, 2005, and posted a list of CBA member banks in Indiana at a website created for that purpose.[7] As a result of that campaign, thousands of complaints have been received by CBA member banks in Indiana, and thousands of citizen comments have been filed with the FCC in opposition to the CBA's Petition.[8]

No one, of course, questions the right of Indiana or its citizens to make their views in this proceeding known. The Indiana Attorney General's aggressive response to the prospect of a confirmation of this Commission's jurisdiction over interstate telemarketing, however, underscores the urgency of the relief requested in the Petition.

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[6] Indiana Attorney General Steve Carter, *Bankers Want Indiana's No-Call Law Watered Down* (Jan. 25, 2005).

[7] Indiana Attorney General Steve Carter, *Banks Driving Latest Efforts to Change Do-Not-Call Law*, Fort Wayne Journal Gazette (Feb. 15, 2005); *see* website at www.SaveDoNotCall.com.

[8] The Indiana Consumer Counselor states that in "the six business days between January 25th and February 1st 2005, the FCC posted 4,753 comments from Indiana residents regarding the CBA petition." Indiana Consumer Counselor Comments at 2.

II. INDIANA'S ASSERTED "CONSUMER PROTECTION" RATIONALE CANNOT OVERCOME THE COMMISSION'S JURISDICTION

In opposing this Commission's jurisdiction over interstate telemarketing, Indiana argues principally that its telemarketing restrictions are "consumer protection" laws of the kind that states routinely are permitted to enforce, even when the abusive conduct in question is facilitated by interstate communications. In fact, Indiana insists that the "preemptive impact of the [Communications Act] relates to the regulation of interstate telephone *facilities and service,*" and is confined specifically to the regulation of common carriers.[9]

Indiana is correct that consumer protection laws and "remedies generally applicable to all corporations operating in [a] state . . ." may generally be applied against persons who violate those laws by means of interstate communication.[10] In fact, the Communications Act expressly acknowledges this "police power" jurisdiction of the states when it provides that nothing in the Act shall "abridge or alter the remedies now existing at common law or by statute . . . ."[11] However, there is no merit to Indiana's claim that the Commission's exclusive jurisdiction to regulate "all interstate or foreign regulation by wire or radio . . ." extends only to common carrier facilities and services.[12]

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[9] Indiana Comments at 5, 8 (emphasis in original).

[10] *Operator Services Providers of America*, 6 FCC Rcd 4475, 4477 (1991)("*Operator Services*").

[11] 47 U.S.C. § 414.

[12] In fact, Section 2(b) of the Act, by confirming the power of the states to regulate "charges, classifications, practices, services, facilities, or regulation for or in connection with intrastate communication service by wire or radio *of any carrier . . .*," suggests that it is state jurisdiction - not federal jurisdiction -- that is limited to the regulation of common carriage. 47 U.S.C. § 152(b) (emphasis added).

In fact, the Commission's jurisdiction extends to any aspect of "interstate or foreign communication by wire or radio" that falls within its legislative mandate, including provisions -- such as those of § 227 of the Act -- that apply to non-carrier users of interstate and foreign communication facilities and services.[13] As the Commission has made clear, the police power of the states "does not alter the grant of plenary authority to the Commission over interstate communications," and does not include state regulations that "touch upon matters the Congress intended in the Communications Act to leave to the Commission . . . ."[14]

Indiana could, for example, prosecute a fraud committed against one of its citizens by means of interstate communication, under a tort theory or pursuant to a consumer protection statute of general application. But where, as here, the Congress has given the Commission specific authority to regulate the use of interstate communications for telemarketing, enforcement of Indiana's more restrictive requirements against interstate calls subject to the Communications Act is outside the state's jurisdiction.

III. THE TCPA MANDATES PREEMPTION OF INDIANA'S TELEMARKETING REQUIREMENTS

Besides its arguments based upon the supposed presumption against preemption of state consumer protection enforcement, Indiana claims to find support in the TCPA

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[13] The Communications Act creates specific regulatory regimes for certain classes of services and service providers, including common carriers (Title II of the Act), users of radio spectrum (Title III of the Act) and cable television operators (Title VI). None of these specific regimes is exclusive, however, and the FCC consistently has maintained that its so-called Title I jurisdiction over interstate and foreign communications gives it the authority to regulate entities and activities that do not fit within the narrower Title II, Title III and Title VI categories. *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Title I jurisdiction, for example, empowers the Commission to regulate non-carrier information services. *See, e.g., IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4880 (2004).

[14] *Operator Services*, 6 FCC Rcd at 4477 & n.22.

itself, and particularly in that statute's legislative history, for the proposition that interstate telemarketing calls are fully subject to state jurisdiction.

Notably, Indiana cites the language of section 227(e) of the Act, which in relevant part disclaims any intention to preempt "any State law that imposes more restrictive intrastate requirements or regulations, or which prohibits . . . the making of telephone solicitations."[15] Indiana acknowledges this section's express reference to *intrastate* regulation, but argues that the word "intrastate" does not modify the phrase "the making of telephone solicitations," with the result that states may prohibit such solicitations even when made by means of an interstate call.

Indiana's interpretation of section 227(e), even if accepted, would lead at most to the improbable conclusion that states may *prohibit*, but may not *regulate*, the making of telephone solicitations that cross state lines. Indiana does not explain why Congress would permit complete state abrogation of the federal regime for interstate telemarketing, but would not at the same time permit less drastic state restrictions on those activities. Indiana's reading of section 227(e) simply makes no sense.

Indiana also points to what it characterizes as an early, unenacted version of the TCPA that would specifically have preempted "any provisions of State law concerning interstate communications that are inconsistent with the interstate communications provisions of this section."[16] In Indiana's view, the fact that this language did not appear in the final version of the TCPA demonstrates that Congress specifically decided not to preempt state regulation of interstate telemarketing.

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[15] 47 U.S.C. § 227(e).

[16] Indiana Comments at 16, citing 137 Cong. Rec. S16201 (daily ed. Nov. 7, 1991).

Indiana's conclusion might have some force if the Congress had expressly discarded the cited language in favor of an equally clear disclaimer of intention to preempt state regulation of interstate telemarketing. On the contrary, Congress not only allowed the normal presumption in favor of Commission jurisdiction over interstate and foreign communication to stand in the TCPA, but included a disclaimer of preemption that refers only to *intrastate* regulation.[17] Under these circumstances, the logical conclusion is not that Congress rejected preemption in the final version of the TCPA, but that it chose to declare its preemptive intent through language that is different from, but is no less clear than, the language cited by Indiana.

Finally, Indiana points to section 227(e)(2) of the TCPA, which refers to the merger of state do-not-call lists with the federal registry, as disclosing a specific congressional acknowledgment that states will continue to regulate interstate telemarketing. In fact, the cited section says only that a state or local authority, "in its regulation of telephone solicitations, may not require the use of any database, list, or listing system that does not include the part of such national database that relates to such State."[18] The cited language does not indicate that such state and local "regulation of telephone solicitations" will extend to interstate calling, and section 227(e)(2) lends no support to Indiana's position.

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[17] 47 U.S.C. § 227(e).

[18] *Id*. § 227(e)(2).

IV. INDIANA'S APPEAL TO STATE "REGULATORY EXPERIMENTATION" IS INCONSISTENT WITH CONGRESSIONAL INTENT TO CREATE A UNIFORM REGULATORY SCHEME FOR INTERSTATE TELEMARKETING

As a final argument against this Commission's assertion of its interstate jurisdiction, Indiana contends that the federal scheme will stifle important state experimentation with methods of controlling unwanted telemarketing.[19] As the Commission pointed out in its *TCPA Order*, however, the Congress already has struck the appropriate balance between state and federal interests, and between the legitimate concerns of consumers and business, by establishing a uniform scheme for interstate telemarketing.[20] At the same time, by preserving the right of the states to establish rules for intrastate telemarketing, Congress permits Indiana and other states to experiment with other approaches to calls that originate and terminate within their borders. There is no reason, in law or policy, to disturb the careful balance the Congress has established.

[19] Indiana Comments at 19-25; *see also* Indiana Consumer Counselor Comments.

[20] *TCPA Order*, 18 FCC Rcd at 14064.

CONCLUSION

Indiana has shown no reason why the Commission should not assert its jurisdiction over interstate telemarketing, and why the Commission should not resolve the uncertainty and turmoil that the states' refusal to permit enforcement of the federal rules is continuing to cause. Accordingly, the Commission should grant the CBA's Petition as promptly as possible.

Respectfully submitted,

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Date: February 17, 2005

CERTIFICATE OF SERVICE

I, Theresa Rollins, do hereby certify that I have on this 17th day of February 2005, had copies of the foregoing **REPLY COMMENTS** delivered to the following via electronic mail or U.S. First Class mail, as indicated:

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